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In the
Supreme Court of the United States
October Term, 1993

RICHARD K. EHRLICH, as trustee of the 1985 Ehrlich Family Trust and as Trustee of the July 28, 1965, Trust,
Petitioner,

v.

CITY OF CULVER CITY, CITY COUNCIL OF THE CITY OF CULVER CITY, STEVEN GOURLEY, JOZELLE SMITH, JAMES BOULGARIDES, AND PAUL A. JACOBS,
Respondents.

Petition for Writ of Certiorari to the Court of Appeal, State of California

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITIONER, RICHARD K. EHRLICH

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Pursuant to Supreme Court Rule 37, Pacific Legal Foundation (PLF) respectfully move this Court for leave to file the attached amicus curiae brief in support of petitioner, Richard K. Ehrlich. Consent to the filing of this brief has been granted by counsel for petitioner, and has been lodged with the Clerk of this Court. Respondent, City of Culver City, *et al.*, has withheld consent, necessitating the filing of this motion.

IDENTITY AND INTEREST OF AMICUS CURIAE

Pacific Legal Foundation is a nonprofit, tax-exempt corporation organized under the laws of the State of California for the purpose of engaging in litigation in matters affecting the public interest. PLF has over 20,000 contributors and supporters located throughout the nation and maintains its principal office in Sacramento, California. Policy is set by a Board of Trustees composed of concerned citizens, the majority of whom are attorneys. PLF's Board evaluates the merits of any contemplated legal action and authorizes such action only where the Foundation's position has broad support within the general community. PLF's Board has authorized the filing of an amicus curiae brief in this matter.

PLF has participated in numerous cases involving issues arising under the Takings and Due Process Clauses of the Fifth and Fourteenth Amendments to the United States Constitution. PLF attorneys were counsel of record in *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), and PLF participated as amicus curiae in *Keystone Bituminous Coal Association v. DeBenedictis*, 480 U.S. 470 (1987); *Hodel v. Irving*, 481 U.S. 704 (1987); *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304 (1987), and *Lucas v. South Carolina Coastal Council*, 505 U.S. ___, 120 L. Ed. 2d 798 (1992). PLF joined with Richard K. Ehrlich (the petitioner in this case) in an amicus brief in support of Florence Dolan's petition for certiorari in *Dolan v. Tigard City*, Supreme Court No. 93-518, which this Court granted on November 29, 1993.

PLF has also participated in numerous cases involving the forced payment of money or dues which are used for political or other purposes in derogation of the payers' First Amendment Rights. For example, PLF attorneys represented aggrieved members of the State Bar of California in *Keller v. State Bar of California*, 649 U.S. 1 (1990).

Amicus seeks here to augment the argument in the petition for writ of certiorari. PLF's public policy perspective and litigation

experience in support of private property and First Amendment rights will provide an additional viewpoint with respect to the constitutional issues presented.

This case involves another egregious violation of federal constitutional rights in the guise of local land use permitting regulations. In exchange for permission to build condominiums on the site of a defunct health club, the City of Culver City is requiring the property's owner, Richard Ehrlich, to pay a $280,000 fee to "mitigate" the loss of private tennis courts that used to be on the property before they were lawfully demolished in 1989.

This condition is an egregious violation of this Court's decision in *Nollan v. California Coastal Commission* wherein this Court held that permit conditions must bear an essential nexus to a harm which would be created by the project itself, where such harm could justify the denial of the permit in the first place.

In exchange for a permit to construct condominiums on the site of a once money-losing and now demolished health club, the City of Culver City is also forcing Ehrlich to pay for or construct himself $33,220 worth of public art--*which must be approved in advance by the city council*! Forcing Ehrlich to pay for or to put up public art (approved by the City Council) violates Ehrlich's First Amendment right of free expression. The city's requirement or Ehrlich to finance city council approved art impinges upon Ehrlich's First Amendment rights and as such is in direct conflict with *Keller v. State Bar of California* and *Virginia State Board of Education v. Barnette*, 319 U.S. 624, 634 (1943) (rejecting view, in mandatory flag salute case, that we have "a Bill of Rights which guards the individual's right to speak his own mind, [but] left it open to public authorities to compel him to utter what is not in his mind").

If the decision below stands, it will represent a serious setback to the First Amendment right of free expression and the Fifth Amendment guarantee against the taking of private property without just compensation. This result would abridge fundamental

notions of fairness and equity by unconsciously tipping the constitutional balance in favor of the state's regulatory power over the rights of the individual.

For the above reasons, Pacific Legal Foundation requests that its motion to file the amicus curiae brief which follows be granted.

DATED: December ___, 1993.

Respectfully submitted,

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TABLE OF CONTENTS

Page

IDENTITY AND INTEREST OF AMICUS CURIAE ii

TABLE OF AUTHORITIES CITED vii

INTEREST OF AMICUS CURIAE 1

OPINION BELOW 2

STATEMENT OF THE CASE 2

REASONS FOR GRANTING THE WRIT 4

I. SUMMARY OF ARGUMENT 4

II. THE EHRLICH CASE REFLECTS A PERVASIVE MISINTERPRETATION OF TAKINGS LAW IN CALIFORNIA 5

III. THE EHRLICH DECISION CONFLICTS WITH THE STANDARD SET IN NOLLAN V. CALIFORNIA COASTAL COMMISSION 6

A. Nollan's Two-Part Test Establishes Heightened Scrutiny for Permit Conditions 6

B. Nollan's Heightened Scrutiny Requirement Has Been Recognized by Virtually All Serious Commentators 11

C. Nollan's Heightened Scrutiny Requirement Has Been Recognized and Followed by State Courts Throughout the United States 13

Page

IV. THE COURT'S RATIONALIZATION OF THE FEE AS COMPENSATION FOR A "BENEFIT CONFERRED" AND AS COMPENSATION FOR "LOST" RECREATIONAL FACILITIES IS ILLOGICAL AND VIOLATES NOLLAN 15

A. Denial of the Permit To Put the Property to Another Use Cannot Be Justified on the Basis of a "Loss" of Community Facilities 15

B. Forcing a Property Owner To Maintain Property for a Particular Nonproductive Use Does Not Fulfill a Legitimate Governmental Interest Because It Violates the Owner's Right To Go Out of Business 17

V. THE COURT'S APPROVAL OF A $33,220 IN LIEU OF ARTS FEE IS ANOTHER REASON WHY THE CERTIORARI SHOULD BE GRANTED . 18

CONCLUSION 19

TABLE OF AUTHORITIES CITED

Page

CASES

Abood v. Detroit Board of Education,
431 U.S. 209 (1977) 19

Agins v. City of Tiburon, ... 4,7,11,17
447 U.S. 225 (1980)

Allgeyer v. State of Louisiana,
165 U.S. 578 (1897) 17

Armstrong v. United States,
364 U.S. 40 (1960) 4,20

Blue Jeans Equities West v. City and County of
San Francisco, 3 Cal. App. 4th 164 (1992) 5,9

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City of Sacramento, 941 F.2d 872 (9th Cir. 1991),
cert. denied, ___ U.S. ___, 118 L. Ed. 2d 593 (1992) . 5,6,9

Dolan v. Tigard City, Supreme Court No. 93-518 2,20

First English Evangelical Lutheran Church of Glendale v.
County of Los Angeles, 482 U.S. 304 (1987) 5

In the Matter of the "Plan for Orderly
Withdrawal from New Jersey" of Twin City
Fire Insurance Company, 609 A.2d 1248 (1992) 14

Keller v. State Bar of California,
496 U.S. 1 (1990) 19

Page

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505 U.S. ___, 120 L. Ed. 2d 798 (1992) 5,7,15,16,18

Meyer v. Nebraska, 262 U.S. 390 (1923) 17

New York v. United States,
505 U.S. ___, 120 L. Ed. 2d 120 (1992) 3

Nollan v. California Coastal Commission,
483 U.S. 825 (1987) ..... *passim*

Parks v. Watson, 716 F.2d 646
(9th Cir. 1983) 8

Penn Central Transportation Co. v.
City of New York, 438 U.S. 104 (1978) 20

Robinson v. Diamond Housing Corporation,
463 F.2d 853 (D.C. Cir. 1972) 17

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City of San Diego, 450 U.S. 621 (1981) 20

Seawall Associates v. City of New York,
542 N.E.2d 1059 (N.Y. 1989) 14

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Commission, 226 Cal. App. 3d 1260 (1991) 10,14

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Barnette, 319 U.S. 624 (1943) 19

Yee v. City of Escondido, 503 U.S. ___,
118 L. Ed. 2d 153 (1992) 10

Page

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First Amendment 3,5,18,19,20

Fifth Amendment 3,19

Fourteenth Amendment 13

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Page

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BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITIONER, RICHARD K. EHRLICH

INTEREST OF AMICUS CURIAE

The interests of amicus curiae are set forth in the preceding motion and are adopted herein.

OPINION BELOW

The opinion of the California Court of Appeal is reported at *Ehrlich v. City of Culver City*, 15 Cal. App. 4th 1737 (1993).[1]

STATEMENT OF THE CASE

Richard Ehrlich once owned a money-losing, private health and tennis club in Culver City. In 1974 Ehrlich applied for and received approval of a site plan to build the club. Unfortunately, it was a money loser. After trying for 14 years to make it work, Ehrlich decided to replace the club with housing. The club was closed in 1988 and in 1989 was lawfully demolished after Ehrlich donated the club's equipment to Culver City. In exchange for a building permit, however, Culver City is now forcing Ehrlich to pay a fee of $280,000 so that the city can build its own public tennis courts--allegedly to make up for the loss of public recreational opportunities represented by the demolished private facilities.

On November 29, 1993, this Court granted certiorari in *Dolan v. City of Tigard*, No. 93-518. Pacific Legal Foundation represented itself and Richard K. Ehrlich as amici in support of the petition for certiorari in *Dolan*. Lower courts have devised a formula for abuse and obfuscation of this Court's formulation of the law of takings and conditions as it was described in *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987). *Dolan* represents one-half of the formula. This case represents the other half.

Dolan raises once again the question of whether a condition or exaction of ***land*** in exchange for a building permit can be harmonized with the Fifth Amendment's Takings Clause--especially when the exaction bears no discernible relationship to an impact created by the building project. Richard Ehrlich's case

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[1] For the court's convenience, references to the decision below shall be to the reported decision and the decision as reproduced in petitioner's appendix.

represents the second half of the equation: whether an exaction of ***money or fees*** imposed in exchange for a building permit can be harmonized with the Fifth Amendment's Takings Clause--especially when the exaction bears no discernible relationship to an impact created by the building project. Some local and state governments, such as the City of Culver City and some courts, recognize the existence of the *Nollan* decision but have attempted to avoid it, purportedly by distinguishing *Nollan* to its facts, claiming alternatively that *Nollan* applies only to "possessory takings" or only to permit exactions of interests in real estate rather than cash.

The city is also requiring Ehrlich to pay a $30,000 public park facilities fee (which is not the subject of this litigation) and a $33,220 in lieu of public arts fee. This latter fee may only be waived if Ehrlich chooses to erect the art himself--*so long as the city council approves the art in advance*. This fee is a violation of Ehrlich's First Amendment right of free speech--or right not to speak. As important as the Fifth Amendment takings issues are to this case, the First Amendment issues provide an equally compelling rationale for review by this Court.

Ehrlich, therefore, is left with a few very unpalatable choices. Ehrlich could leave the land vacant and receive no economically beneficial or productive use whatsoever from the land. Ehrlich could rebuild the defunct, money-losing health club and presumably avoid paying any fees (although the city's rationale for the public arts fee would remain)--which would force Ehrlich to forego economically *viable* use of his land *and* suffer occupation by members of the public. Ehrlich could sell the land to the proverbial "investor-sucker" who would have the opportunity to rebuild the defunct, money-losing health club. Finally, Ehrlich could build the condominiums and pay the extortionate fees to the city. These choices all force Ehrlich to submit to unacceptable and unconstitutional regulatory strictures. As this Court noted in a different context, "[a] choice between two unconstitutionally coercive regulatory techniques is no choice at all." *New York v. United States*, 505 U.S. ___, 120 L. Ed. 2d 120, 150 (1992).

REASONS FOR GRANTING THE WRIT

I

SUMMARY OF ARGUMENT

The legal reasoning employed by the appellate court and the *result* conflicts with controlling federal precedents thus creating a conflict between California and federal interpretations of the United States Constitution.

The inherent vice with the Court of Appeal's decision is its facile conclusion that permit conditions requiring exactions are acceptable if they merely meet the general test for regulatory takings set out in *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980) (regulations must (1) substantially advance a legitimate governmental interest and (2) leave a property owner with economically viable use). In reaching this conclusion the court avoided consideration of the more specific test in *Nollan* for permit conditions. In short, there was no genuine showing that the exaction was designed to mitigate any public burden created by the project itself.

The erroneous direction taken by the court below was further compounded by its conclusion that monetary exactions are different from other exactions and its consequent refusal to apply the heightened scrutiny standard of review as required by *Nollan* for all regulatory takings.

As will be shown, the exaction demanded here improperly sought to force the landowner to bear a public burden which, in all fairness and justice, should be borne by the public as a whole. The United States Supreme Court has repeatedly said that this represents the essence of and purpose behind the Takings Clause which was designed to prevent the sort of result found in the decision below. *See, e.g., Armstrong v. United States*, 364 U.S. 40, 49 (1960).

Finally, the requirement that Ehrlich pay a $33,220 art fee not only violates the principles of *Nollan* but also violates the property owner's First Amendment right to refrain from expression--in this case to refrain from financing the artistic statement of the city council and its approved artists.

II

THE EHRLICH CASE REFLECTS A PERVASIVE MISINTERPRETATION OF TAKINGS LAW IN CALIFORNIA

Despite decisions of this Court, including *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304 (1987), *Nollan v. California Coastal Commission*, 483 U.S. 825, and *Lucas v. South Carolina Coastal Council*, 505 U.S. ___, 120 L. Ed. 2d 798, 813 (1992), abuse of property owners by government regulators at the state and local level remains endemic in California. Part of the reason may well be the anarchic state of lower court decisions in California, some of which appear to flatly contradict the precedents of this Court. For example, in *Blue Jeans Equities West v. City and County of San Francisco*, 3 Cal. App. 4th 164 (1992), the First District Court of Appeal upheld a "transit impact fee" that had only a questionable relationship to any harms created by the development project. Ignoring the plain meaning of *Nollan*, the *Blue Jeans* appellate court reasoned that the United States Supreme Court's decision in *Nollan* did not apply to exactions of money or fees (but only to exactions of land) even though this Court had said nothing of the kind.

The Ninth Circuit Court of Appeals has been troublesome as well. In *Commercial Builders of Northern California v. City of Sacramento*, 941 F.2d 872 (9th Cir. 1991), *cert. denied*, ___ U.S. ___, 118 L. Ed. 2d 593 (1992), the Appeals Court found that a monetary exaction (fees imposed on commercial development to pay for subsidized low-income housing) did not fail the heightened scrutiny test set out in *Nollan*, 483 U.S. at 834 n.3, because "*Nollan* does not stand for the proposition that an exaction

ordinance will be upheld only where it can be shown that the development is directly responsible for the social ill in question. Rather *Nollan* holds that where there is *no* evidence of a nexus between the development and the problem that the exaction seeks to address, the exaction cannot be upheld."

The case at issue, *Ehrlich v. City of Culver City*, is an even more egregious example which fails not only *Nollan* nexus test but also the reformulation of the test in *Commercial Builders*. As explained below, there is simply no serious connection between Ehrlich's construction of condominiums and a need for public art and public tennis courts. *Ehrlich* involves the "extortion" of a $280,000 fee to pay for public tennis recreational facilities in exchange for a permit to build condominiums. The fee is unrelated to any need for public recreation created by the condominiums (a $30,000 park impact fee, paid without protest, covers whatever such need as may exist). 15 Cal. App. 4th at 1743, Appendix to Petition For Writ of Certiorari (petitioner's appendix) at 4-5. In short, there is no "essential nexus" between the fee and the project as required by *Nollan*, 483 U.S. at 837. The City of Culver City wants more public recreation and it is trying to take it from Ehrlich by forcing him to pay a fee that is utterly unrelated to any impact created by his proposed development.

III

THE EHRLICH DECISION CONFLICTS WITH THE STANDARD SET IN NOLLAN V. CALIFORNIA COASTAL COMMISSION

A. Nollan's Two-Part Test Establishes Heightened Scrutiny for Permit Conditions

The most troubling problem with the *Ehrlich* decision is its inherent conflict with *Nollan*. The decision at Pages 14-16 of petitioner's appendix, 15 Cal. App. 4th at 1749-50, contains the most serious misunderstandings of takings law after *Nollan*.

Nollan noted the existence of a bright-line test: if a regulation does not "substantially advance"[2] a legitimate state interest, there is a taking. 483 U.S. at 834 (citing one of two independent tests in *Agins*, 447 U.S. at 260).[3] The Court continued that a regulation in the form of a permit condition meets this "substantially advance" requirement if two conditions are met: first, the government must be able to deny the permit outright (which it cannot do if the denial would so drastically reduce the value of the property as to constitute a taking), 483 U.S. at 835-36, and second, the "permit condition ... [must] serve[ ] the same legitimate police-power purpose as a refusal to issue the permit," *Nollan*, 483 U.S. at 836. Therefore, a permit condition must bear an "essential nexus" to a legitimate police power purpose that could have been used to deny the permit in the first place. *Id.* at 837.

It has not been argued by the city that the permit to build condominiums could have been denied because of any adverse public health, safety, or welfare concerns created by the condominiums. Nor can it seriously be argued that the permit could be denied because of the loss to the community of demolished private tennis courts nor even the loss of the artistic sensibilities inherent in the demolished courts. Thus, the city's permit conditions fails the first part of the *Nollan* test, making the second part (that the condition must serve the same purpose as the denial) moot. Even if the city *could* have denied the permit, it has never shown that the fees would ameliorate any genuine harm

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[2] The term "'substantially advance'" is especially significant as it is distinguished from a mere "rational basis" test. *Nollan*, 483 U.S. at 834 n.3. This heightened scrutiny essentially places the burden of proof upon the government agency rather than involving simply an "exercise in cleverness and imagination" or a mere "pleading requirement." *Id.* at 841.

[3] The other bright-line test is the "economically viable use" test which is met when a regulation destroys all economically beneficial or productive use of property. *Agins*, 447 U.S. at 260; *Lucas*, 120 L. Ed. 2d at 813.

caused by the condominums. In considering this issue, most significantly, the court below badly missed the proper standard of review for this second part.

Nollan cited to over two dozen cases for the proposition that permit conditions must be closely related to impacts actually caused by the proposed development project. *Nollan*, 483 U.S. at 839-40. The first of these cases is particularly instructive. In that case, *Parks v. Watson*, 716 F.2d. 646 (9th Cir. 1983), the court was called on to decide whether the City of Klamath Falls could condition the development of a housing project (which required the vacation of city platted streets) on the dedication of the fee title to a 20-foot strip of land which contained potential geothermal wells to the city. In short, the city wanted the geothermal resource for free. Even though it referred to the old pre-*Nollan* "rational relation" test, it is still obvious that that court would readily reject a condition not mandated by a legitimate governmental interest. The court concluded:

> Since the requirement that Klamath Valley Company give its geothermal wells to the City had no rational relationship to any public purpose related to the vacation of the platted streets, the unrelated purpose does not support the requirement that the company surrender its property without just compensation.

Id. at 653.

Merely identifying a legitimate purpose of regulation is no longer sufficient to avoid a finding of a taking. Rather, regulatory bodies must "demonstrate *a specific and logical connection* between burdens produced by new development and conditions designed to alleviate such burdens." William A. Falik & Anna C. Shimko, *The "Takings" Nexus--The Supreme Court Chooses a New Direction in Land-Use Planning: A View from California*, 39 HASTINGS L.J. 359, 389 (1988) (emphasis added; footnote omitted).

The appellate court in *Ehrlich*, however, unjustifiably limits the application of *Nollan's* heightened scrutiny requirement only to permit conditions that are also physical invasions:

> Where the condition on approval constitutes a physical taking of private property, the condition must substantially advance the governmental purpose and is subject to heightened scrutiny by the courts. [Citation to *Blue Jeans* omitted.] Monetary exactions compelled as a condition of approval must be only rationally related to the governmental purpose. [Citation to *Blue Jeans* and *Commercial Builders of Northern California v. Sacramento*, 941 F.2d 872 (9th Cir. 1991), omitted.]

15 Cal. App. 4th at 1749, petitioner's appendix at 13-14.

This is wrong because *every* kind of permit condition, physical, monetary, or whatever, logically must be subject to the heightened scrutiny test to see whether the regulation substantially advances a legitimate governmental interest. Indeed, what if a portion of the $280,000 were used to condemn a portion of Ehrlich's property? How would that be any different from the unconstitutional exaction in *Nollan*? To the extent that *Blue Jeans* and *Commercial Builders* purport to hold the contrary, those cases are in conflict with *Nollan*. The holding in *Nollan* is not confined to physical invasions. It is clear from the plain facts of *Nollan* that no physical invasion was involved or even contemplated in that case. The Court did note that *if* the Coastal Commission had simply required the Nollans to give up their land to provide public access, then there would have been a physical invasion and a taking. *Nollan*, 483 U.S. at 831-32.

However, this Court's discussion of permit "conditions" is in no way confined to conditions that are "physical invasions." The Court's "essential nexus" test as set out at 483 U.S. at 836-37 is simply not dependent on a condition being a physical invasion. (Indeed, the analogy used by this Court to illustrate the need for an essential nexus involves a ***monetary*** condition. *Id.* at 837.

The proper scope of *Nollan* was recently set out by the United States Supreme Court in *Yee v. City of Escondido*, 503 U.S. ___, 118 L. Ed. 2d 153, 161 (1992), where the Court reiterated the criteria for *physical* takings: "The government effects a physical taking only where it *requires* the landowner to submit to the physical occupation of his land." *Yee*, 118 L. Ed. 2d at 161 (emphasis in original). This was plainly not the case in *Nollan* which involved a coercive exaction imposed as a condition to the issuance of a building permit. Since *Nollan* was not a physical takings case, the heightened scrutiny requirement enunciated by the Supreme Court in *Nollan* cannot be confined to physical takings.[4] It is in the context of *regulatory* takings that *Nollan* "changed the standard of constitutional review in takings cases." *Surfside Colony, Ltd. v. California Coastal Commission*, 226 Cal. App. 3d 1260, 1270 (1991).

Indeed, the *Yee* Court cites *Nollan* as an *example* of a *regulatory* takings case, distinguishing it from the physical takings theory advanced in *Yee*:

> [Evidence of the distributional effects of a regulation] might have some bearing on whether the ordinance causes a *regulatory* taking, as it may shed some light on whether there is a sufficient nexus between the effect of the ordinance and the objectives it is supposed to advance. See Nollan v California Coastal Comm'n, supra, at 834-835, 97 L Ed 2d 677, 107 S Ct 3141. But it has nothing to do with whether the ordinance causes a *physical* taking.

Yee, 118 L. Ed. 2d at 167 (emphasis in original). Thus, the notion that *Nollan* is merely a physical invasion case has been implicitly overruled in *Yee*. Finally, *Nollan's* heightened scrutiny "substantial advancement" standard was first laid down by the

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[4] Indeed, the degree of scrutiny is irrelevant in a physical takings situation because, where a physical invasion is shown, the result is a per se taking.

Supreme Court in *Agins v. City of Tiburon*, a case that involved a challenge to a *zoning* ordinance. Even granting that an incautious reader might become confused and read *Nollan* as a physical invasion case, this could hardly be possible in *Agins*.

If for no other reason than its conflict with *Nollan*, this Court should grant the petition for certiorari. However, as explained in the next two sections below, the decision of the Court of Appeal strays not only from our view of *Nollan*, but it also strays from the interpretations of *Nollan* of a vast number of commentators and the courts of several other states that have considered the meaning of *Nollan*.

B. Nollan's Heightened Scrutiny Requirement Has Been Recognized by Virtually All Serious Commentators

Nollan's heightened scrutiny requirement has been almost universally recognized and discussed in legal journals and commentaries, often by authors who are openly hostile to the *Nollan* doctrine. It is not possible to convey the full breadth of the consensus on this point within the limitations of a single brief. The following is a highly abbreviated but typical sampling of this literature (note that these quotes do not relegate *Nollan's* holding to only *"physical"* (as opposed to *all regulatory)* takings):

> *Nollan's* most important holding is the heightened standard of judicial review it adopted ....

Daniel R. Mandelker, LAND USE LAW § 2.23 at 45 (2d ed. 1988).

> It was Justice Scalia's use of the language of intermediate heightened scrutiny, in connection with a takings analysis ... that marks the importance of the *Nollan* case.

Lawrence Berger, *Inclusionary Zoning Devices as Takings: The Legacy of the Mount Laurel Cases*, 70 NEB. L. REV. 186, 210 (1991).

> [In *Nollan*], the Court said that it would subject governmental interference with private property to a higher standard of scrutiny than it had in prior decades.

Bart H. Thompson, Jr., *Judicial Takings*, 76 VA. L. REV. 1449, 1449-50 n.1 (1990).

> [*Nollan*] suggests that a heightened standard of review has replaced the less stringent standard applied by California and Texas courts ....

Brian W. Blaesser & Christine M. Kentopp, *Impact Fees: The "Second Generation,"* 38 WASH. U. J. URB. & CONTEMP. L. 55, 100 (1990).

> *Nollan* marks a move away from the minimal rationality test that had been used by the Court in its prior takings analysis.

Bernard F. Meroney, *"Taking" on the Environment: The Takings Clause and Environmental Law--Some Observations*, 36 LOY. L. REV. 1083, 1098 (1991).

> The majority [in *Nollan*] considered a private property interest to be a right, like free speech, subject to heightened judicial scrutiny.

Steven G. Biddle, *Justice Stevens' Pro-Land Use Planning Views and Recent Regulatory Takings Cases*, 21 URB. LAW. 579, 584 (1989).

> *Nollan* not only heightens the level of judicial scrutiny to which state regulators are subject, it also shifts the burden of proof onto the governmental entity defending the land use or environmental ordinance challenged as a regulatory taking.

Rigoberto V. Obregon & Rebekah L. Parker, *"Get It Right the First Time": A Message from the United States Supreme Court to Land Use and Environmental Regulators--A Comment on Nollan and First English*, 7 UCLA J. ENVT'L L. & POL'Y 173, 178 (1988) (footnote omitted). *See also*, Kari Anne Gallagher, Comment: *Yee v. City of Escondido--Will Mobile Homes Provide an Open Road for the Nollan Analysis?*, 67 NOTRE DAME L. REV. 821, 838 (1992); Terry D. Morgan, *Regulatory Takings: A State and Federal Perspective*, 1991 PROCEEDINGS OF THE INSTITUTE ON PLANNING, ZONING, AND EMINENT DOMAIN 6-16 (footnote omitted); Jason R. Rose, Note, *Forced Tenancies as Takings of Property in Seawall Associates v. City of New York Expanding on Loretto and Nollan*, 40 DEPAUL L. REV. 245, 249 (1990) (footnote omitted); Note, *The Supreme Court, 1986 Term: Leading Cases*, 101 HARV. L. REV. 119, 245, 247 (1987).

PLF is aware of only one article to the contrary. *See* Karl Manheim, *Tenant Eviction Protection and the Takings Clause*, 1989 WIS. L. REV. 925. A review of this article indicates that the author meant to draw on the Supreme Court's traditional distinction between regulatory takings and permanent physical invasions; the argument lacks merit because, as explained above, the distinction it tries to find in *Nollan* simply does not exist.

C. Nollan's Heightened Scrutiny Requirement Has Been Recognized and Followed by State Courts Throughout the United States

In addition to receiving widespread recognition and comment in legal literature, *Nollan's* requirement of heightened scrutiny in regulatory takings cases has been recognized and applied by state courts faced with federal takings claims brought under the Fourteenth Amendment.

> [Regulatory takings challenges require] "semi-strict or heightened judicial scrutiny of regulatory means-ends relationships" as articulated in *Nollan*.

Seawall Associates v. City of New York, 542 N.E.2d 1059, 1068 (N.Y. 1989) (striking down a ***monetary*** exaction imposed on hotel owners who wanted to remove vacant rooms from single-room, occupancy rentals).

> [T]he United States Supreme Court has acknowledged that the "rationality" standard determinative of substantive-due-process challenges to State regulation is less stringent than the "takings" standard, which requires that the taking "substantially advance" the State interest to be achieved ....

In the Matter of the "Plan for Orderly Withdrawal from New Jersey" of Twin City Fire Insurance Company, 609 A.2d 1248, 1259 (1992) (citing *Nollan*, 483 U.S. 825).

> *Nollan* ... changed the standard of constitutional review in takings cases. Whether the new standard be described as "substantial relationship," or "heightened scrutiny," it is clear the rational basis test ... no longer controls.

Surfside Colony, Ltd. v. California Coastal Commission, 226 Cal. App. 3d at 1270 (footnotes omitted). *See also*, *id.* at 1270 n.18 (quoting 101 HARV. L. REV. at 247) (ellipses in original).

In short, the appellate court's interpretation of *Nollan* significantly diverges from an overwhelming majority of commentators and courts that have examined that case. *Ehrlich* thus conflicts with *Nollan*.

IV

THE COURT'S RATIONALIZATION OF THE FEE AS COMPENSATION FOR A "BENEFIT CONFERRED" AND AS COMPENSATION FOR "LOST" RECREATIONAL FACILITIES IS ILLOGICAL AND VIOLATES NOLLAN

Under the Nollan two-part, heightened-scrutiny test, a permit condition can be imposed only if the permit could legitimately be denied in the first place (*without* effecting a taking) and if the permit condition serves to ameliorate the harm or burden which could have justified the permit denial. *Nollan*, 483 U.S. at 836-37. In this case, no permit denial can be justified--not only because it would render the property economically valueless, *see, e.g.*, Ehrlich's Petition For Writ of Certiorari at 13 (which would be a taking--*see Lucas*, 120 L. Ed. 2d at 813), *but also* because forcing Ehrlich to remain in the health club business does not substantially advance a legitimate governmental interest.

Even if the permit denial could be justified, the fee does not ameliorate the burdens that could rationalize that denial. However, the appellate court tried to evade these arguments by claiming that the city had the right to force the property owner to use the land only for a recreational facility and to deny all other uses, that there was some sort of productive use in the property as a recreational facility, and that a justification for a denial would be ameliorated by a substitute fee. None of these justifications has merit.

A. Denial of the Permit To Put the Property to Another Use Cannot Be Justified on the Basis of a "Loss" of Community Facilities

The appellate court below tries to justify the fee on other grounds, to wit:

> [T]he [Ehrlich] mitigation fee was not imposed as a condition relating to the development project's burden on the community for increased community services ... *[but] was imposed to compensate the City for the*

> *benefit conferred on the developer by the City's approval of the townhome project* and for the burden on the community resulting from the loss of recreational facilities.

15 Cal. App. 4th at 1749-50, petitioner's appendix at 19-20, (emphasis added). First of all, there is no authority for stating that a landowner's economic benefit supplies a sufficient underpinning for an exaction. If it is understood that the police power forms the exaction's constitutional foundation, it must also be understood that that power is aimed at public need, not private profit. In other words, the fact that there might be some "benefit" to the property owner from a permit cannot justify the denial of the permit and therefore cannot justify any sort of fee. Nor can a fee be based on the "benefit" to the landowner (as bizarrely calculated at 15 Cal. App. 4th at 1750, petitioner's appendix at 16, where the court noted that the condominiums might be worth $10 million) where the fee is not in any way related to any "harm" or "loss" created by the project that could justify a permit denial.

Second, "the distinction between 'harm-preventing' and 'benefit-conferring' regulation is often in the eye of the beholder" and "[i]t would be pointless to make the outcome of this case hang upon this terminology." *Lucas*, 120 L. Ed. 2d at 818 and 818 n.11. It all comes down to a simple point: the city wants recreational facilities and it wants someone else to pay for them. *Nollan's* nexus requirement should not be transmuted into a rule of the convenient patsy.

Third, as fully explained by petitioner throughout his petition for certiorari, there is no "loss" of any recreational facilities here because they had been shut down since 1988 and because they were *private* not public facilities.

Furthermore, the court's attempt to turn this private club into a public facility--with the attendant "loss" to the community, by labeling it as a "community" facility, 15 Cal. App. 4th at 1750, petitioner's appendix at 16, is an utterly meritless exercise in grammatical legerdemain. By this reasoning every restaurant, club

(private and public), barbershop, hotel, and law office would be a "community" facility.

B. Forcing a Property Owner To Maintain Property for a Particular Nonproductive Use Does Not Fulfill a Legitimate Governmental Interest Because It Violates the Owner's Right To Go Out of Business

Finally, no government has any legitimate interest in requiring a person to maintain a particular business or follow a particular profession. Without a legitimate interest in requiring Ehrlich to stay in the health club business against his will, the city fails the first prong of *Agins*, 447 U.S. at 260. Using such a fictitious "community" interest as an excuse to hold Ehrlich responsible for Culver City's public recreational needs violates his constitutional right to pursue or not to pursue the profession of one's choice.

In *Allgeyer v. State of Louisiana*, 165 U.S. 578 (1897), this Court held that "[t]he liberty mentioned in that [Fourteenth] amendment ... is deemed to embrace the right of the citizen ... to live and work where he will; to earn his livelihood by any lawful calling; to pursue any livelihood or avocation." *Id.* at 589. *See also Meyer v. Nebraska*, 262 U.S. 390, 399 (1923).

This right means government cannot force landowners to use their property for a particular type of business and includes the right to go out of business. As stated by Judge J. Skelly Wright in *Robinson v. Diamond Housing Corporation*, 463 F.2d 853 (D.C. Cir. 1972): "There would be severe constitutional problems with a rule of law which required an entrepreneur to remain in business against his will." *Id.* at 867. The decision below is in conflict with *Robinson* because Ehrlich is given the choice of remaining in a money-losing business, losing all use and value of his land, or paying an exorbitant fee.

Contrary to the appellate court's assertion, the city cannot force a person to "use his property, if at all, for a recreational purpose," 15 Cal. App. 4th at 1750, petitioner's appendix at 16,

especially when confining use of property to recreational use deprives it of all "economically beneficial or productive use." *See Lucas*, 120 L. Ed. 2d at 813. If the business is a bust then no one is going to buy it; if the decision below is not granted review, it will provide an archetype for local governments to hold people in the position of Ehrlich stuck with useless property with nothing but the privilege of paying taxes on it or the privilege of paying a "fee" to escape the bondage.

V

THE COURT'S APPROVAL OF A $33,220 IN LIEU OF ARTS FEE IS ANOTHER REASON WHY THE CERTIORARI SHOULD BE GRANTED

In addition to the unchallenged $30,000 parks fee, and the $280,000 recreational facility fee, the appellate court also upheld a $33,220 fee which was in lieu of the requirement that Ehrlich provide public art worth 1% of the calculated value of the project. 15 Cal. App. 4th at 1755-58, petitioner's appendix at 24-30. Ehrlich must also ensure for perpetual maintenance of any art built.

Applying the *Nollan* test, the city cannot justify the fee. The condominiums were not being constructed on the site of the Sistine Chapel, the Louvre, the Oakland Museum of Art, the Watts Towers, or even a site as auspicious as the Tilted Cadillacs of Amarillo, Texas. Even in New York City, demolished tennis courts are not considered art when the demolition is not done by a critically recognized artist. Ehrlich, incidentally, is not an artist. In short, no art was lost and no art fee can be justified.

Finally, the appellate court dismissed Ehrlich's First Amendment challenge to the public arts fee with the rationale that Ehrlich could have always put up his *own* art worth $33,220 instead of paying the in lieu of fee. 15 Cal. App. 4th at 1758, petitioner's appendix at 29. However, this still forces Ehrlich to propagate public art against his will *and whatever art is constructed must be approved by the city council*. The First

Amendment protects the right to speech just as much as it protects the right *not* to speak. *West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 634 (1943) (rejecting view, in mandatory flag salute case, that we have "a Bill of Rights which guards the individual's right to speak his own mind, [but] left it open to public authorities to compel him to utter what is not in his mind").

In *Keller v. State Bar of California*, 496 U.S. 1 (1990), this Court found it unlawful to require a person to pay a fee for political purposes as a mandatory condition for engaging in an occupation. As this Court noted in *Keller*, it is a bedrock principle of American thought that persons should not be compelled to contribute to causes with which they do not agree: "'to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves is sinful and tyrannical.'" Thomas Jefferson, *quoted in Keller*, 496 U.S. at 11 (quoting *Abood v. Detroit Board of Education*, 431 U.S. 209, 234-35 n.31 (1977) (quoting I. Brant, James Madison: The Nationalist 354 (1948)).

CONCLUSION

The appellate court's notion that *Nollan* did not change the standard of constitutional review in taking cases *when* ***monetary*** exactions are involved fails to comprehend the *Nollan* Court's decision.

Virtually all commentators, including those openly hostile to the ruling, have recognized that *Nollan* established a requirement of heightened scrutiny. So have most courts outside of California that have considered the issue. Yet the *Ehrlich* court would adopt a deferential standard of review and uphold a $280,000 public recreation fee because a defunct private health club would no longer be available to the "community." This sort of nonsense cannot be justified by any court (under even a rational standard of review and certainly not under a heightened scrutiny standard).

This Court has described the basic purpose of the Takings Clause to the Fifth Amendment:

> The Fifth Amendment's guarantee ... [is] designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.

Armstrong v. United States, 364 U.S. at 49, *(cited in Nollan,* 483 U.S. at 835 n.4) (noting that this is the "principal" rationale for the Fifth Amendment's Taking Clause); *San Diego Gas & Electric Co. v. City of San Diego,* 450 U.S. 621, 656 (1981) (Brennan, J., dissenting); *Penn Central Transportation Co. v. City of New York,* 438 U.S. 104, 123 (1978). *Dolan* can remedy part of the problem created by the lower courts; this case can solve the remainder.

Unless this Court can countenance the explosion of local fees and exactions placed on property owners in order to meet all manner of public wish lists for which the public as a whole is unwilling to contribute through taxes or assessments, the petition for certiorari should be granted. Otherwise, the rationale for the Takings Clause will be lost and the First Amendment weakened.

This Court has accepted review in *Dolan v. City of Tigard,* a case where a local government is requiring an unjustifiable grand of *land* as a permit condition. *Ehrlich* involves an unjustifiable exaction of *money.*

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Respectfully submitted,

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